



**TOURO COLLEGE**  
**JACOB D. FUCHSBERG LAW CENTER**  
*Where Knowledge and Values Meet*

## Digital Commons @ Touro Law Center

---

Scholarly Works

Faculty Scholarship

---

1999

### Section 1983 Litigation – Supreme Court Developments

Martin A. Schwartz

*Touro Law Center*, [mschwartz@tourolaw.edu](mailto:mschwartz@tourolaw.edu)

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Constitutional Law Commons](#), and the [Litigation Commons](#)

---

#### Recommended Citation

15 Touro L. Rev. 859 (1999)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

## SECTION 1983 LITIGATION- SUPREME COURT DEVELOPMENTS

*Martin A. Schwartz* \*

Section 1983<sup>1</sup> is a vital part of American law because it is the statute that enables the courts to enforce the Bill of Rights and the Fourteenth Amendment against state and local officials. At the same time, Section 1983 litigation is typically very complex; it is quite multifaceted. It seems to generate an almost endless stream of new issues and nuances. The Supreme Court's decisions from last term dealing with Section 1983 litigation illustrate the potential range of issues that can arise in litigation of a Section 1983 case.

I would like to list, as a starting point, the subject areas of last term's Section 1983 decisions. First, there were two cases dealing with subject matter jurisdiction, specifically, removal jurisdiction. Second, there was a major decision dealing with substantive due process in the context of a high-speed police pursuit, *County of Sacramento v. Lewis*.<sup>2</sup> Third, there was a prosecutorial immunity

---

\* Professor Martin A. Schwartz is highly accomplished in the field of § 1983 litigation and, among other things authored a leading treatise entitled *Section 1983 Litigation: Claims and Defenses* (3d ed. 1997) and *Section 1983 Litigation: Federal Evidence* (2d. ed. 1995). In addition, Professor Schwartz is the author of a monthly column in the New York Law Journal, entitled "Public Interest Law." Professor Schwartz has also been the co-chair of the Practicing Law Institute Program on § 1983 litigation for over fourteen years.

The author expresses appreciation for the valuable assistance of Adam Kleinberg in the preparation of this article.

<sup>1</sup> 42 U.S.C. § 1983 (1994). This section provides in part that:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.* See generally 1A, 1B, 1C MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983: CLAIMS AND DEFENSES (3d ed. 1997).

<sup>2</sup> 118 S. Ct. 1708 (1998).

decision, determining when a prosecutor is entitled to absolute prosecutorial immunity. Fourth, there was a decision dealing with absolute legislative immunity. Finally, there was a major decision last term dealing with qualified immunity.

It is interesting to think about the decisions of last term in the Section 1983 area as a group, because, on the one hand, they seem to have a law school flavor. Many of them look like they could easily end up being the questions that appear on a final exam, which is not meant to be a hint for students. On the other hand, in sharp contrast to that cerebral quality of the decisions, they also have a real life litigation aspect to them; they deal with very practical issues that come up in the Section 1983 area. I think that they are reflective of the fact that the United States Supreme Court is beginning to understand some of the real life litigation problems that district court judges and attorneys face when they embark on the litigation of a Section 1983 case. As I go through the decisions, you will see what I mean about this duality, the law school flavor and practical flavor at the same time.

### 1. Subject Matter Jurisdiction

Let us start with the first category, subject matter jurisdiction. Federal courts have subject matter jurisdiction over Section 1983 claims pursuant to the general federal question statute.<sup>3</sup> It is also resolved at this point that state courts have current jurisdiction over Section 1983 actions.<sup>4</sup>

If a Section 1983 claim is brought in a state court, the question arises as to whether the defendant is able to remove it to a federal court.<sup>5</sup> Removal jurisdiction may not strike you as being a thrilling issue, however, this issue is actually very important because the plaintiff, for some strategic reason, chose the state court forum. Now, if the defendant has the right to remove the case from state to federal court, the defendant can effectively take away the choice of forum, which originally was lodged with the plaintiff. So, despite

---

<sup>3</sup> See SCHWARTZ, *supra* note 1, at 35-37. See 28 U.S.C. § 1331 (1994). See also 28 U.S.C. § 1343 (a)(3) (1994) (providing for an alternative source of federal court subject matter jurisdiction over Section 1983 claims).

<sup>4</sup> See 1A SCHWARTZ, *supra* note 1, at 61.

<sup>5</sup> See generally Martin A. Schwartz, *Supreme Court and Civil Rights Removal Decisions*, N.Y. L.J., Dec. 15, 1998, at 1.

the procedural, technical aspect of the issue, this is something that becomes of strategic importance. If the Section 1983 claim is the only claim in the state court complaint, the state action is clearly removable to federal court.<sup>6</sup> It is removable to federal court because federal statutory authority allows the removal of state court actions that could have been brought in federal court in the first instance.<sup>7</sup>

Removal complications arise when the state court complaint asserts not only a Section 1983 claim, which is a federal cause of action, but also asserts some other claim. For example, the plaintiff may also assert "pendent" state law claims, or a claim which, if it had been asserted in federal court, would be barred by the Eleventh Amendment.<sup>8</sup> The lower federal courts have had a lot of difficulty in dealing with these types of issues. The United States Supreme Court last term dealt with both situations.

Let's take the first situation, a Section 1983 claim filed in state court together with a state law claim. You can very easily think about this situation in New York. Let's say, for example, that a complaint is filed in New York Supreme Court asserting a constitutional claim under Section 1983 and a judicial review claim under Article 78 of the New York Civil Practice Law and Rules.<sup>9</sup> The question arises whether that state complaint is removable to federal district court.

The United States Supreme Court last term had a similar case which came out of the Seventh Circuit, *City of Chicago v. International College of Surgeons*.<sup>10</sup> In *City of Chicago*,<sup>11</sup> the United States Supreme Court held that when a state court complaint alleges a federal constitutional claim under Section

---

<sup>6</sup> See 1A SCHWARTZ, *supra* note 1, at 55-58.

<sup>7</sup> 28 U.S.C. § 1441(a) (1997). See also 28 U.S.C. § 1441(b)(1997) (authorizing removal of claims arising under federal law).

<sup>8</sup> U.S. CONST. amend. XI. The Eleventh Amendment states in pertinent part: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States Citizens of another State, or by Citizens or Subjects of any foreign State." *Id.*

<sup>9</sup> Under New York law, an action may be consolidated with a special proceeding, such as an Article 78 proceeding. See DAVID D. SEIGEL, *NEW YORK PRACTICE* 195 (2d ed. 1991).

<sup>10</sup> 522 U.S. 156 (1997).

<sup>11</sup> *Id.*

1983, along with an Article 78 judicial review state law claim, the state complaint is removable to federal district court.<sup>12</sup> You may still think that does not sound too exciting, but the dissenters in the case described the majority opinion as being a “watershed decision,” and a “landmark result.”<sup>13</sup> What were they thinking about? Why were they describing the majority decision in such extreme terms? The thinking was that the function of state court review of administrative agency action has historically and traditionally been a function of the state courts, and that is what state courts have been doing forever. Here, the United States Supreme Court is saying that federal courts are empowered to adjudicate judicial review claims that historically and traditionally have been viewed as primarily, if not solely, the function of state courts.

The United States Supreme Court rejected the position of the Seventh Circuit.<sup>14</sup> The Seventh Circuit reasoned that deferential judicial review of agency action is akin to appellate review, and thus not within the powers of the district courts, which are courts of original jurisdiction. The circuit court concluded that a state judicial review proceeding is not a “civil action” within a district court’s “original jurisdiction” under the removal statutes, and thus could not be removed.<sup>15</sup>

The United States Supreme Court, however, rejected that reasoning.<sup>16</sup> The majority reasoned that if the Section 1983 claim was the only claim, clearly it could have been removed from state to federal court.<sup>17</sup> The judicial review claim comes within what we used to refer to as pendent jurisdiction, but now refer to as supplemental jurisdiction, under the federal supplemental jurisdiction statute, 42 U.S.C. Section 1441 (a). The Supreme Court held that the judicial review claim, arising out of the same

---

<sup>12</sup> *Id.* at 167.

<sup>13</sup> *Id.* at 167-70 (Ginsburg, J., dissenting). Justice Stevens joined Justice Ginsburg’s dissenting opinion.

<sup>14</sup> *Id.* at 162. *See also* *International College of Surgeons v. City of Chicago*, 91 F.3d 981 (7th Cir. 1996).

<sup>15</sup> 91 F.3d at 990. The circuit court ordered remand to state court. *See also* *City of Chicago*, 91 F.3d 981 (7th Cir. 1996).

<sup>16</sup> 522 U.S. at 169.

<sup>17</sup> *Id.* at 164.

basic set of facts as the Section 1983 claim, is a claim that comes within the supplemental jurisdiction of the federal courts.<sup>18</sup>

The Court made two important points about supplemental jurisdiction.<sup>19</sup> First, the supplemental jurisdiction statute applies equally to cases removed to the federal courts as it does to cases that have been originally filed in federal court.<sup>20</sup> That is important because it is a holding of first impression from the United States Supreme Court. Additionally, the Court said that the supplemental jurisdiction statute “codifies” the principles of power and discretion developed under the decisional law previously covering pendent jurisdiction.<sup>21</sup>

However, the fact that the district court has supplemental jurisdiction over the state judicial review claim does not mean that the court is obligated to exercise that jurisdiction. The district court has discretion to decline the exercise of that jurisdiction.<sup>22</sup> That is going to be an essentially ad hoc case-by-case analysis by the district court judge.

The other thing that could happen to the supplemental claim is that the district court might find that the claim invokes one or more of the abstention doctrines.<sup>23</sup> Again, the mere fact that the claim is removable to federal court does not guarantee that the federal court is actually going to hear the judicial review claim.

The other case dealing with subject matter jurisdiction and removal was *Wisconsin Department of Corrections v. Schacht*.<sup>24</sup> In *Schacht*, the state court complaint asserted a Section 1983 claim against a state official, seeking monetary relief against the official in his personal capacity.<sup>25</sup> Additionally, the complaint asserted a second claim, which was within the scope of the Eleventh

---

<sup>18</sup> *Id.*

<sup>19</sup> See generally SCHWARTZ, *supra* note 3, at 1

<sup>20</sup> *City of Chicago*, 118 S. Ct. at 533.

<sup>21</sup> *Id.* at 530. See also *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

<sup>22</sup> 28 U.S.C. § 1367(c) (1994).

<sup>23</sup> See SCHWARTZ, *supra* note 3, at 3.

<sup>24</sup> 118 S. Ct. 2047 (1998). The Supreme Court granted certiorari in *Schacht* to resolve the conflict of whether a case consisting of one claim that is barred by the Eleventh Amendment deprives the federal courts of jurisdiction over the entire case. *Id.*

<sup>25</sup> See, e.g., *Hafer v. Melo*, 502 U.S. 21 (1991) (holding that personal capacity claims are not barred by Eleventh Amendment).

Amendment, meaning that the claim would be barred by state sovereignty immunity.<sup>26</sup> The United States Supreme Court held that even when a state court claim might be barred by the Eleventh Amendment, that does not bar the removal of the state complaint from state court to federal court, and the federal court can assert removal jurisdiction over the non-barred claim.<sup>27</sup> In this case, it would be over the personal capacity claim.

This decision is important because it resolves a split in the circuits.<sup>28</sup> Some circuit courts, including the Seventh Circuit, took the position that the presence of even one claim that is barred by the Eleventh Amendment deprived the federal courts of removal jurisdiction over the entire case.<sup>29</sup> Other circuits, however, have held that the presence of a claim barred by the Eleventh Amendment did not bar removal of the present action.<sup>30</sup>

The United States Supreme Court rejected the Seventh Circuit's position. *Schacht* held that the Supreme Court can hear the non-barred claim; the claim that was barred by the Eleventh Amendment was remanded to the state court.<sup>31</sup>

One thing that is interesting about that opinion is that the Court relied upon the fact that the Eleventh Amendment gives the state only a potential defense. Thus, we do not really know that, what we are calling "the barred claim," is in fact going to be a claim barred by the Eleventh Amendment, because the state might choose not to assert its Eleventh Amendment defense.<sup>32</sup> Maybe the state would rather defend the case on the merits. I think that this is all true as a matter of legal theory, but the reality is that state waivers of Eleventh Amendment immunity are few and far between.

## 2. Substantive Due Process

Let me move to the second area, substantive due process. Individuals, who sue under Section 1983, usually attempt to seek

---

<sup>26</sup> *Schacht*, 118 S. Ct. at 2051.

<sup>27</sup> *Id.*

<sup>28</sup> See SCHWARTZ, *supra* note 3, at 4.

<sup>29</sup> *Schacht*, 118 S. Ct. at 2051 (describing the Seventh Circuit's decisional law).

<sup>30</sup> See *id.* (describing the conflict in the circuits).

<sup>31</sup> *Id.*

<sup>32</sup> See SCHWARTZ, *supra* note 1, at 4.

protection under some specific guarantee of the Bill of Rights, such as free speech,<sup>33</sup> freedom of religion,<sup>34</sup> Fourth Amendment,<sup>35</sup> and so forth. In a fairly substantial number of cases, however, individuals who feel aggrieved by state and local governmental action are unable to find protection in the specific guarantees of the Bill of Rights, and may seek to get protection from what they think is arbitrary, sometimes even oppressive, governmental action under the general doctrine of substantive due process.

In recent years, the United States Supreme Court has made very clear its feeling on this issue. The Court has come out and expressed its distaste, one might even say disdain, for the doctrine of substantive due process.<sup>36</sup> The Court has given two main reasons. First, the doctrine does not find any support in the text of the Constitution, it talks about due process, it does not talk about any type of substantive protection.<sup>37</sup> Second, the Court has said that it does not feel that it has sufficient standards or guidelines to enable it to engage in responsible decision making when there is a claim of substantive due process.<sup>38</sup> It is quite clear that substantive due process is not a favored doctrine in the United States Supreme Court.<sup>39</sup>

This theme of negativism was expressed again last term in the case of *County of Sacramento v. Lewis*,<sup>40</sup> where the Court was dealing with high-speed police pursuits. Let me set forth the facts briefly. These are very tragic facts, but they do not lead to a constitutional remedy. In *Lewis*, two deputy sheriffs pursued a speeding motorcycle operated by an eighteen-year-old named Brian Willard.<sup>41</sup> Phillip Lewis, a sixteen year old, was a passenger

---

<sup>33</sup> U.S. CONST. amend. I.

<sup>34</sup> *Id.*

<sup>35</sup> U.S. CONST. amend. IV.

<sup>36</sup> See, e.g., *Albright v. Oliver*, 510 U.S. 266 (1993).

<sup>37</sup> *Graham v. Connor*, 490 U.S. 386 (1989).

<sup>38</sup> *Collins v. Harker Heights*, 503 U.S. 115 (1992). "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Id.* at 125.

<sup>39</sup> See *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1712. See also Martin A. Schwartz, *The Decision on Police Pursuit*, N.Y. L.J., Oct. 20, 1998, at 3.



on the motorcycle. The two deputy sheriffs made numerous attempts to get the motorcycle to slow down and stop.<sup>42</sup> The pursued vehicle did not stop, and the speed escalated to a point where the deputy sheriffs were pursuing the motorcycle at a speed of one hundred miles per hour.<sup>43</sup> The chase ended when the motorcycle driver, Willard, tried to make a sharp left turn and his motorcycle tipped over.<sup>44</sup> The driver of the motorcycle, Willard, was able to get out of the way, but Lewis was not, and the deputy's patrol car crashed into Lewis. Lewis was propelled 70 feet as a result of the impact. He was pronounced dead at the scene of the accident.<sup>45</sup> Lewis' parents and his representatives brought suit in federal court under Section 1983. They claimed that the police pursuit violated Lewis' right to substantive due process, specifically the right to life.<sup>46</sup>

They asserted a substantive due process claim with full awareness of what this doctrine is all about. But it was the only constitutional claim they had. Why do I say that? They could not assert a Fourth Amendment violation<sup>47</sup> because they would have had to show there was a "seizure," and they were unable to show that the police pursuit brought about a seizure of Lewis.<sup>48</sup> Why? Because when you go to the Supreme Court's definition of "seizure," the Supreme Court holds that "a seizure occurs only when the governmental action terminates an individual's freedom through means that were intentionally applied."<sup>49</sup> This police

---

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> U.S. CONST. Amend. IV. The Fourth Amendment states in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Id.*

<sup>48</sup> *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1712 (1998).

<sup>49</sup> *Brower v. County of Inyo*, 489 U.S. 593 (1989). In *Brower*, Justice Scalia stated that a seizure only occurs when governmental action terminates an

pursuit was not a means that was intentionally designed to bring about an accident that would result in the death of Lewis. So there was no Fourth Amendment claim. There was no support for the plaintiff's claim in any specific text of the Bill of Rights, so the plaintiff relied upon substantive due process.

The critical issue in this case was the proper substantive due process standard for evaluating the constitutionality of high-speed pursuits. If one follows the decisional law in this area, there has been, all over the country, a proliferation of cases like this. In this case, it was the innocent passenger on the motorcycle who was killed. In other cases, sometimes it was a by-stander, someone in an other vehicle, or somebody who is just minding his or her own business. I say a "proliferation" of these cases all over the country, except New York City. Maybe because of New York City traffic you just can't have high-speed pursuits in New York City.

The Supreme Court said that the governing substantive due process standard was whether the police officer's pursuit was shocking to the conscience.<sup>50</sup> That raised the next question; what is going to shock the conscience? The Court says, "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience necessary for a due process violation."<sup>51</sup> That means, in a case like *Lewis*, the plaintiff has to show that the police officer acted with the purpose to cause harm. I think that standard is so rigorous, and I think what I am saying is an understatement, that very few plaintiffs' lawyers in high-speed pursuit cases are going to file substantive due process claims. How is the plaintiff going to be able to show that the officer engaged in this pursuit acted with a

---

individual's freedom through means intentionally applied. A seizure would result if a police officer intentionally rams his patrol car into a suspect's car. However, a seizure would not occur if a "pursuing police car unsuccessfully sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit, but accidentally stopped the suspect by crashing into him." See Schwartz, *supra* note 41, at 3.

<sup>50</sup> The *Lewis* Court observed that the "shocks the conscience" test was first formulated in *Rochin v. California*, 342 U.S. 165 (1952) and was applied in *Rochin* to conduct by police officials "with full appreciation of . . . the brutality of these acts." 118 S. Ct. at 1718 n.9.

<sup>51</sup> *Id.*

purpose to cause harm?<sup>52</sup> Typically, it is a tense situation, that is rapidly evolving, it happens very quickly, and the police officer has to make a split-second decision. How is the plaintiff ever going to show that this police officer acted with purpose to cause harm? It is not enough to show the officer made an unwise, foolish or even stupid decision. The plaintiff must show that the officer's purpose was to harm the pursued driver.

That means plaintiffs will have to turn to state law for protection. I looked to see what the New York law is, and it turns out that it does not give the plaintiffs much in the way of protection either. In New York, the standard that the plaintiff has to show is that the pursuing police officer acted with a reckless disregard for the safety of others.<sup>53</sup> The New York Court of Appeals made it clear that that is something more than a negligence standard.<sup>54</sup> So that is going to be pretty tough, maybe not quite as tough as purpose to cause harm, but still a very rigorous standard. That gives the officer a lot of protection.

The decision in the *Lewis* case is an important decision beyond the context of high-speed police pursuits, because the Court made some very significant statements concerning the meaning and the application of substantive due process.<sup>55</sup> The *Lewis* Court ruled that substantive due process differs depending upon whether the plaintiff is challenging legislative action as opposed to executive action.<sup>56</sup> This is the first time that the United States Supreme Court has drawn this distinction. Taking it a step further, this is the first time that the United States Supreme Court has declared that the shocks the conscience standard is limited to challenges to executive action, enforcement of the legislative policy, and that it is a different approach if the plaintiff is challenging the constitutionality of the legislative policy itself.<sup>57</sup>

---

<sup>52</sup> See Schwartz, *supra* note 41, at 3.

<sup>53</sup> The New York Court of Appeals has interpreted Vehicle and Traffic Law Section 1104 to mean that a police pursuit "may not form the basis of civil liability to an injured bystander unless the officer acted in reckless disregard for the safety of others." *Saارين v. Kerr*, 84 N.Y.2d 494, 501 (1994).

<sup>54</sup> *Lewis*, 118 S. Ct. at 1718.

<sup>55</sup> See Schwartz, *supra* note 41, at 2.

<sup>56</sup> *Lewis*, 118 S. Ct. at 1716.

<sup>57</sup> *Id.* at 1724 n.2. "The proposition that 'shocks-the-conscience' is a test applicable only to executive action is original with today's opinion . . . .

The Court gave as an example the physician assisted suicide case, *Washington v. Glucksberg*.<sup>58</sup> In a case challenging legislative action, the key substantive due process issue is whether history and tradition support the recognition of an implied fundamental constitutionally protected right that would justify some type of heightened standard of judicial review.<sup>59</sup> The Court did not say this but, if there was no such justification for an implied fundamental constitutionally protected right, then the substantive due process inquiry is whether the legislative policy is reasonably related to the governmental issue.<sup>60</sup> It is not a shocks the conscience inquiry.

The second important thing that the Court said about substantive due process is, with respect to the executive action, different types of executive actions call for different kinds of shocks the conscience evaluation or analysis.<sup>61</sup> The Court said that deliberate indifference is an appropriate measure of whether official conduct is conscience shocking when, but only when, actual deliberation by an official is practical. The court gave as examples the adoption of the deliberate indifference standard in cases involving the provision of medical care to an arrestee.<sup>62</sup> In that situation, if the official does not deliberate at all, or if the official deliberates in such a slipshod fashion that it's virtually no deliberation, that official conduct is shocking to the conscience. On the other hand, if you have a case like *Lewis*, where an official does not have a realistic opportunity to deliberate, and must make a split-second decision, then it is not appropriate to apply the deliberate indifference standard. In that situation the court should inquire whether the official acted with a purpose to cause harm. The court had made similar rulings in prior cases, but this is the first time the

---

[Although pleased] to accept whatever limitations the Court . . . is willing to impose upon the shocks-the-conscience test . . . it is a puzzlement why substantive due process protects some liberties against executive officers but not against legislatures." *Id.*

<sup>58</sup> *Id.* at 1717. See *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

<sup>59</sup> *Id.*

<sup>60</sup> See SCHWARTZ, *supra* note 3.

<sup>61</sup> *Id.* at 1716.

<sup>62</sup> See *City of Revere v. Massachusetts*, 463 U.S. 239 (1983). See also Schwartz, *supra* note 41, at 3.

court has put it all together, and I think it is going to have a big impact in future litigation.

The Court is saying that when an official has to make a governmental decision without any realistic opportunity to deliberate, the substantive due process standard, which starts out being very protective of the official, becomes even more protective. Once again, a purpose to show harm is normally impossible to show.

### 3. Prosecutorial Immunity

Let me move to the third category, prosecutorial immunity. There are officials, like prosecutors, whom, because of the special nature of the function they carry out, are given absolute immunity from personal liability.<sup>63</sup> The prosecutor, is only given absolute immunity for carrying out the prosecutorial function.<sup>64</sup> In other words, it is a functional approach. For example, a prosecutor's decision whether or not to prosecute is part of the advocacy function and prosecutorial function. Here, the United States Supreme Court says the prosecutor is given absolute immunity.<sup>65</sup> Preparation for trial and the actual prosecution of the case are also parts of the advocacy function and the prosecutor is absolutely immune from liability.

When we discuss absolute immunity, what does it mean to be absolutely immune? Are prosecutors immune from liability for a malicious or even an egregious wrongdoing? Yes, so long as the prosecutor was engaged in the advocacy function. If the prosecutor steps outside the role of advocate and engages in an investigatory or an administrative function, the United States Supreme Court says that absolute immunity does not apply.<sup>66</sup>

---

<sup>63</sup> See 1B SCHWARTZ, *supra* note 1, at § 9.8.

<sup>64</sup> See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 431 (1986), where the United States Supreme Court determined that prosecutors are absolutely immune from Section 1983 monetary liability when their activities are "intimately associated with the judicial phase of the criminal process." *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See *Buckley v. Fitzsimmons*, 113 S.Ct. 2606, 2615 (1993), where all the justices agreed that absolute immunity does not cover a prosecutor's statement at a press conference. There was no immunity at common law for a prosecutor's statements to the press as they are not part of the prosecutor's advocacy function and they are not closely related to the judicial process. *Id.*

Sometimes, the function in which a prosecutor is engaged is obvious. However, sometimes it is difficult to figure out. In some cases, you need to determine if the prosecutor acted more like a detective or a police officer. If so, there is no absolute immunity. However, if the prosecutor was acting more like an advocate, she is entitled to absolute immunity. Sometimes, this is a very close call.<sup>67</sup>

In last term's prosecutorial decision, *Kalina v. Fletcher*,<sup>68</sup> the prosecutor commenced a criminal proceeding, and did so by preparing and filing three documents – an information, a motion for an arrest warrant and a sworn certificate in support of the motion for a warrant that summarized the evidence in support of a criminal charge.<sup>69</sup> The United States Supreme Court found the preparation and filing of the information as well as the preparation and filing of a motion for the arrest warrant to be part of the advocacy function.<sup>70</sup> However, the Court ruled that the third document, the sworn certificate that summarized the evidence and swore to the accuracy of the information, was not part of the advocacy function.<sup>71</sup> That action taken by the prosecutor is akin to the conduct of a complaining witness, and complaining witnesses are not entitled to absolute immunity under Section 1983. They did not have immunity under common law, and they do not have absolute immunity under this statute either.<sup>72</sup>

This is very interesting for two reasons; one, if you had asked somebody to study this issue before this case had come down, it would seem advocates prepare sworn statements all the time. They put together facts and draft affidavits. Attorneys do prepare affidavits as part of the advocacy function.

The other interesting thing about this is that the Court separated the prosecutor's function for purposes of immunity analysis.<sup>73</sup> The Court could have looked at what the prosecutor did as one package, the advocacy package. However, it did not do that. It

---

<sup>67</sup> See SCHWARTZ, *supra* note 1, § 9.8 (distinguishing between advocacy and nonadvocacy functions).

<sup>68</sup> 118 S. Ct. 502 (1997).

<sup>69</sup> *Id.* at 505.

<sup>70</sup> *Id.* at 507.

<sup>71</sup> *Id.* at 509-10.

<sup>72</sup> *Id.* at 508. See *Malley v. Briggs*, 475 U.S. 335 (1986).

<sup>73</sup> *Kalina*, 118 S. Ct. at 508.

looked at each activity separately. This has a significant impact on real life litigation. When district court and circuit court judges review questions of prosecutorial immunity, *Kalina v. Fletcher* suggests that the judge must evaluate each activity separately in order to determine whether the official is entitled to absolute immunity.<sup>74</sup>

#### 4. Legislative Immunity

The other absolute immunity decision, *Bogan v. Scott-Harris*,<sup>75</sup> involves legislative immunity. The plaintiff, Janet Scott-Harris was an administrator of the City of Fall River, Massachusetts, Department of Health and Human Services. Reading between the lines, they did not like her very much. The local legislative body enacted an ordinance eliminating the Department of Health and Human Services, which abolished her position.<sup>76</sup> The plaintiff filed suit in federal district court under Section 1983 against a city council member, the mayor who signed the ordinance into law, and the City. She alleged that the City's elimination of her position was racially motivated and in retaliation for having exercised her First Amendment rights in filing a complaint against a fellow employee who had served temporarily under her supervision.<sup>77</sup>

The Supreme Court in *Bogan* held that the legislative activities of these local officials, voting in support of the legislation, and signing the legislation into law, were protected by absolute legislative immunity.<sup>78</sup> Even though it was alleged to be racially discriminatory and a violation of free speech, it was protected by absolute legislative immunity.

Three main points come out of this decision. First, local legislative officials are entitled to the same absolute immunity for their legislative acts as state legislative officials.<sup>79</sup> This was an

---

<sup>74</sup> *Id.*

<sup>75</sup> 118 S. Ct. 966 (1998).

<sup>76</sup> *Id.* The Mayor, Daniel Bogan, proposed budget-cutting measures for the 1992 fiscal year, including the elimination of 135 City positions. "As part of this package, Bogan called for the elimination of DHHS, of which [Ms. Scott-Harris] was the sole employee." See Martin A. Schwartz, *Absolute Immunity for Local Legislators*, N.Y. L.J., June 16, 1998, at 3.

<sup>77</sup> *Bogan*, 118 S. Ct. at 969.

<sup>78</sup> *Id.* at 973.

<sup>79</sup> *Id.* at 970-72.

issue upon which the United States Supreme Court had never spoken before in the past, a ruling of first impression.

The second important ruling in *Bogan* is that absolute legislative immunity covers the legislative acts of legislative officials and the motive, intent, good or bad faith of the official is irrelevant.<sup>80</sup> If it is a legislative activity, it is covered by absolute legislative immunity, and we are not concerned with whether the official may have had an unconstitutional motive.<sup>81</sup> This is important, because the district judge submitted the question of discriminatory motive and the question of retaliatory intent to the jury. The United States Supreme Court said it was error to submit those questions to the jury because they are irrelevant to the legislative act immunity defense.<sup>82</sup>

The third important issue in *Bogan* was whether a vote to abolish a position is a legislative act? The Supreme Court said yes.<sup>83</sup> First of all, it was legislative procedurally; it went through a legislative process. Second, even though the action by the legislative officials only affected one individual, it could still be legislative because abolishing a position and setting budgetary priorities was part of the policy making process. Even though the decision to abolish the position only affected Ms. Scott-Harris immediately, it had prospective implications, because other people could not apply for this position.

It would be different if the local legislative body wanted to get rid of Ms. Scott-Harris and fired her instead of abolishing her position. Absolute legislative immunity would not apply because hiring and firing is an administrative action, and only qualified immunity applies in that situation.<sup>84</sup> The lesson here is, if a local legislative body wants to get rid of a particular public employee, the way to do it is to abolish the position altogether rather than keep the position and fire the employee. I do not know if there are any limits to that. What if they abolish the position and the next day they create a new one? I do not know. I expect that is probably going to happen at some point.

---

<sup>80</sup> *Id.* at 973.

<sup>81</sup> *Id.* at 972-73.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *See Forrester v. White*, 484 U.S. 219 (1988).



### 5. Qualified Immunity

Let me get to the last issue, qualified immunity.<sup>85</sup> Most officials are not entitled to assert absolute immunity, they are only entitled to the lesser-qualified immunity.<sup>86</sup> I think that qualified immunity is the most important issue in Section 1983 litigation. It is certainly the most important defense. I say that because it resolves a very high percentage of Section 1983 cases.

The key issue in qualified immunity is whether the official violated clearly established federal law. If a public official sued under Section 1983 violated the plaintiff's federally protected rights but did not violate clearly established federal law, she is protected from personal liability. However, if you have an official being sued under Section 1983 who, not only violated federal law, but violated clearly established federal law, she will not be protected. The United States Supreme Court described qualified immunity as a type of fair notice standard, which may be a good way to look at it.<sup>87</sup> If the law at the time of the alleged wrong is not clearly established, the official could not be said to "know" that the law forbade conduct not previously identified as unlawful.<sup>88</sup>

The Supreme Court has said in a number of cases this qualified immunity defense is not only an immunity from liability, it is actually an immunity from having to defend the case at all.<sup>89</sup> Now if you want to give the official immunity from having to defend the case, the immunity defense should be decided by the district judge as early in the litigation as possible.<sup>90</sup> The defense should be decided pre-trial or even pre-discovery, and decided as a matter of law. Typically, the expectation is the immunity defense will be raised on motion for summary judgment. The thinking is that, if

---

<sup>85</sup> See generally SCHWARTZ, *supra* note 1, § 9.13.

<sup>86</sup> *Id.*

<sup>87</sup> *United States v. Lanier*, 520 U.S. 259 (1997).

<sup>88</sup> See generally SCHWARTZ, *supra* note 1, § 9.16, at 355.

<sup>89</sup> See, e.g., *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (finding that qualified immunity provides not merely an immunity from liability, but an "immunity from suit" as well, meaning an immunity from the burdens of trial and often even from pretrial discovery).

<sup>90</sup> *Hunter v. Bryant*, 112 S. Ct. 534, 536 (1991) (holding that because qualified immunity is an immunity from suit and not just from liability, it should be resolved "at the earliest possible stage in litigation").

the case goes very far down the road, the official loses the immunity from the burden of defending the suit.

A major issue over the years has arisen as to how the qualified immunity defense should be handled when the plaintiff's constitutional claim implicates the motivation of the defendant official.<sup>91</sup> For example, on a claim of racial discrimination, the plaintiff has to show that the defendant acted with discriminatory intent.<sup>92</sup> Subjective intent is brought into play by virtue of the nature of the constitutional claim. Or, if you have a First Amendment retaliation claim, the first issue was whether the defendant official acted with intent to retaliate against the plaintiff because the plaintiff chose to exercise free speech rights.<sup>93</sup>

This First Amendment retaliation problem was before the court last term in *Crawford-El v. Britton*.<sup>94</sup> How do you implement qualified immunity when you have a First Amendment retaliation case? Initially, the court recognized the tension between the nature of the constitutional claim and the nature of the qualified immunity defense. The constitutional claim that is being asserted places the defendant official's motive or intent in issue, and, typically, that is going to present a question of disputed fact.<sup>95</sup> The official is unlikely to say, "I made this decision because I don't like blacks" or "I did this to the plaintiff because I don't like people who speak out." That is very rarely the case. On the other hand, the qualified immunity defense is an objective reasonableness standard, which the court says should be decided as a matter of law, and the official's subjective intent does not matter.<sup>96</sup> You have this tension.

The lower courts became concerned that the plaintiff might simply allege retaliatory motive or discriminatory intent, and the fear was, by the mere allegation, the plaintiff would be able to move the case into the discovery stage and maybe into the trial stage. Once the plaintiff is able to do that, then this whole notion

---

<sup>91</sup> See Martin A. Schwartz, *Qualified Immunity Reality*, N.Y. L.J., Aug. 18, 1998 at 3.

<sup>92</sup> *Id.* See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>93</sup> See, e.g., *Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996) (en banc).

<sup>94</sup> 118 S. Ct. 1584 (1998).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

of immunity from suit is pretty much out the window. To prevent plaintiffs from being able to engage in this type of strategy, the lower federal courts started to impose what you might think of as high procedural hurdles upon plaintiffs.<sup>97</sup> Some courts said plaintiffs had to file a heightened pleading; some courts imposed a heightened production burden to defeat the summary judgment qualified immunity motion. The plaintiff would have to come up with strong evidence even at the summary judgment stage.

One of the most extreme examples of what was going on in lower courts was what happened in the *Crawford-El* case. The D.C. circuit court held that, in a First Amendment retaliation case, in order to defeat the public official's summary judgment motion asserting qualified immunity, the plaintiff had to produce clear and convincing evidence that the official acted with a wrongful motive.<sup>98</sup> It was the only court in the country that had done this. The question for the United States Supreme Court was the validity of the D.C. circuit court rule. In a five to four decision, the court held that the rule was invalid.<sup>99</sup> The court gave three main reasons for its decision. First, the rule is not authorized by the Federal Rules of Civil Procedure.<sup>100</sup> The court held that the federal courts have no business rewriting the federal civil procedure rules. If we are going to have new procedural rules, they should come about through the legislative process, not judicial imposition. Second, the majority of the justices thought this rule imposed an unfair burden on plaintiffs. It might operate at summary judgment to deprive plaintiffs who might have meritorious claims of the ability to get to the discovery and trial stages.<sup>101</sup> Third, the court felt that the existing procedures are adequate to protect the defendant against an insubstantial allegation of retaliatory motive.<sup>102</sup> The bottom line is that when you have a claim asserted under Section 1983 that implicates the public official's motive or intent, the qualified immunity defense raised on summary judgment should be

---

<sup>97</sup> See Schwartz, *supra* note 91, at 3.

<sup>98</sup> *Crawford*, 93 F.3d at 813. The en banc court produced five separate opinions. *Id.*

<sup>99</sup> 523 U.S. 574 (1998).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

handled in the normal summary judgment manner. The district court should follow normal summary judgment rules.

The decision in *Crawford-El* is filled with numerous procedural details. It is all in the opinion, but I would stress the broad discretion that the district judge has in managing pre-trial discovery in this type of situation. The opinion reads like a manual for federal district court judges. I do not know about you, but if I am a litigator, I want to know what is in that manual. Normally, those manuals are secret or you have to pay a lot of money to get it. This manual is right there. I recommend that anybody who litigates these types of claims read the manual. It requires very careful reading.

I think what is most significant about the decision in the *Crawford-El* case, is that it marks the first time that the United States Supreme Court has treated and applied qualified immunity in a realistic litigation fashion. It is the first time the court has recognized that if you want to figure out whether the defendant violated clearly established federal law, you first have to know the facts. What were the facts? On one version of the facts, there might not be a violation of clearly established federal law. On some other version, perhaps there might be. So those facts have to be resolved. If the facts are in dispute, there are no two ways about it, they have to be resolved, even if it takes discovery and a trial to resolve them.

Prior to *Crawford-El*, the United States Supreme Court acted as if district judges could magically make these disputed factual issues disappear so that the qualified immunity defense could be decided early in the litigation as a matter of law.<sup>103</sup> I think *Crawford-El* marks a shift from qualified immunity magic to qualified immunity reality, I hope the lower courts get the message. Thank you very much.

---

<sup>103</sup> See Schwartz, *supra* note 91, at 3.

